IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 922 of 1998

with

CRIMINAL APPEAL No 936 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHAGABHAI FATABHAI SODHA

Versus

STATE OF GUJARAT

Appearance:

MR PM VYAS for Appellant in both the appeals.

MR KP RAVAL, ADDL. PUBLIC PROSECUTOR for Respondent in both the appeals.

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and

HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 08/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Criminal Appeal No.936 of 1998 is filed by original accused No.1 i.e. Fatabhai Shankarbhai Sodha, whereas Criminal Appeal No.922 of 1998 is filed by original accused No.2 i.e.Bhagabhai Fatabhai Sodha challenging judgment dated August 18, 1998 rendered by the learned Additional Sessions Judge, Nadiad in Sessions Case No.291 of 1997, by which both of them have been convicted under Section 302 read with Section 34 of the Indian Penal Code ["I.P.C." for short] as well as Sections 307 & 324 read with Section 34 I.P.C. and each sentenced to suffer R.I. for life and fine of Rs.500/-, in default, S.I.for three months for commission of offence punishable under Section 302 read with Section 34 I.P.C. as well as R.I. for two years and fine of Rs.250/-, in default, S.I. for one month for commission of offences punishable under Sections 307 & 324 read with Section 34 I.P.C. It may be stated that the learned Judge has directed that the substantive sentences shall run concurrently and each appellant would be entitled to benefit of set off as provided in Section 428 of the Code of Criminal Procedure, 1973.

As both the appeals filed under Section 374(2) of the Code are directed against the same judgment, this Court proposes to dispose of them by this common judgment.

2. Deceased Ambalal was a resident of village Devkivansol, Taluka : Mahemdavad, District : Kheda. Name of his wife is Chandaben. He had two children. The elder is daughter named Nitaben and the younger is son named Dinesh. Appellant Fatabhai Sodha is real brother of deceased Ambalal, whereas appellant Bhagabhai is son of Fatabhai Sodha. In the sim of village, there was a field which was ancestral property of deceased Ambalal and Fatabhai. They had constructed houses adjoining each other in a corner of the field and were residing therein with their respective families. There was an opening in hedge for ingress and egress. This opening was closed by Fatabhai. Therefore, the deceased had asked Fatabhai as to why the said opening was closed. Thereupon, an altercation had taken place. It is the case of the prosecution that Fatabhai brought a dharia from his house and delivered two blows with the same on head of

Chandaben, who was standing near the deceased, as a result of which Chandaben had fallen down shouting "I am killed". According to the prosecution, Bhagabhai had a thick stick in his hand and he delivered blows on different parts of body of the deceased, as a result of which the deceased had fallen down. What is claimed by the prosecution is that Dinesh i.e. son of the deceased was also assaulted by original accused No.1 with dharia on his head and neck, whereas he had caused an injury on chest of Nitaben, who is daughter of the deceased. Nitaben called neighbour Ramabhai Jenabhai, who in turn, called grandmother and grandfather of Nitaben. The grandfather of Nitaben requisitioned services of a rickshaw, wherein the injured were removed to M.P.General Hospital, Mahemdavad. The Medical Officer on duty at the Hospital found that condition of injured Ambalal and injured Chandaben was serious and, therefore, both of them were referred to Civil Hospital, Ahmedabad for better treatment. The first information report regarding the incident was lodged by Nitaben with Mr.Vinodrai Jeshtharam Raval, who was then P.S.I. of Mehmdavad Police Station. After registration of offences, Mr.Raval recorded statements of Shantaben Khodabhai, Shardaben Dahyabhai etc. and also drew panchnama of place of occurrence. During the course of treatment, injured Ambalal succumbed to his injuries and, therefore, offence punishable under Section 302 I.P.C. was registered against the accused. Thereafter, investigation into the case was made by Hanubha J.Chauhan, who was then Senior P.S.I. of the Police Station. Both the appellants were arrested on July 25, 1997. Necessary arrangement was made to send dead body of the deceased for post-mortem examination. While in custody, the appellants made disclosure statements pursuant to which respective weapons used by them in commission of crime were discovered. The incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory for analysis. On completion of investigation, the appellants were chargesheeted in the Court of learned Judicial Magistrate, First Class, Mahemdavad for commission of offences punishable under Sections 302, 307, 325, 324, 323 read with Section 114 I.P.C. As offences punishable under Sections 302 & 307 I.P.C. are exclusively triable by a Court of Sessions, the case against the appellants was committed to Sessions Court, Kheda for trial. It was made over to the Court of learned Additional Sessions Judge, Kheda at Nadiad, where it was numbered as Sessions Case No.291 of 1997.

3. Charge at Exh.4 was framed by the learned Judge which was read over and explained to the appellants. The

appellants pleaded not guilty to the charge and claimed to be tried. The prosecution, therefore, examined (1) Nitaben Ambalal as PW.1 at Exh.12, (2) Dr.Naishayat Bhanubhai Bhatt as PW.2 at Exh.14, (3) Mansukhbhai Bachubhai Parmar as PW.3 at Exh.19, (4) Dr.Chandrakant Babalal Darji as PW.4 at Exh.21, (5) Dr.Himatbhai Fusabhai Patel as PW.5 at Exh.24, (6) Ashokbhai Chandulal Mochi as PW.6 at Exh.28, (7) Dr.Sunil Balubhai as PW.7 at Exh.32, (8) Chandaben Ambalal as PW.8 at Exh.35, (9) Ramabhai Jenabhai as PW.9 at Exh.36, (10) Bhuriben Ramabhai as PW.10 at Exh.37, (11) Dinesh Ambalal as PW.11 at Exh.41, (12) Vinodrai Jeshtharam Raval as PW.12 at Exh.42, (13) Bhagvatsinh Dahyabhai as PW.13 at Exh.44, (14) Kabhaibhai Gemabhai Chauhan as PW.14 at Exh.46, (15) Dr.Bharat Shankerlal Dave as PW.15 at Exh.50, and (16) Hanubha Jethisinh Chauhan as PW.16 at Exh.54, to prove its case against the appellants. The prosecution also produced documentary evidence such as complaint of Nitaben at Exh.13, certificate of injury of injured Chandaben and deceased Ambalal at Exhs.17 & 18 respectively, panchnama indicating holding of inquest on the dead body of the deceased at Exh.20, post-mortem notes of deceased Ambalal at Exh.22, injury certificate of Chandaben issued by Dr.Himatbhai F.Patel at Exh.26, arrest panchnama of the appellants at Exh.29, panchnama indicating discovery of dharia and thick-stick by the appellants at Exh.30, three telephone Vardhy at Exhs.38, 39 & 40 respectively, panchnama of place of incident at Exh.45, panchnama of seizure of clothes of injured at Exh.47, injury certificate of Dinesh Ambalal at Exh.52, report of Serologist at Exh.57 etc. in support of its case against the appellants.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, case of each appellant was that the case filed was false. However, no evidence was tendered by either of them to substantiate the claim that the case of the prosecution lodged against them was false.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that common intention of the appellants was to cause death of deceased Ambalal and to attempt to commit murder of Chandaben, and that in furtherance of their common intention, the deceased was assaulted with a thick-stick, whereas Chandaben was assaulted with a dharia and, therefore, the appellants

had committed offences punishable under Sections 302 & 307 read with section 34 I.P.C. According to the learned Judge, the appellants were also liable to be convicted of the offences punishable under Sections 325, 324 & 323 read with Section 34 I.P.C. for causing injuries to witness Dinesh and witness Nitaben. It was held by the learned Judge that commission of offence punishable under Section 504 I.P.C. was not proved by the prosecution. In view of abovereferredto conclusions, the learned Judge has convicted the appellants of the offence punishable under Section 302 r.w.sec.34 I.P.C. as well as under Sections 307 & 34 read with Section 34 I.P.C. and imposed sentences referred to earlier by judgment dated August 18, 1998, giving rise to these two appeals.

6. Mr.P.M.Vyas, learned counsel of the appellants, contended that cross-examination of witness Nitaben shows that she had come out of her house after the incident, in which deceased Ambalal and injured Chandaben were assaulted, was over and, therefore, the learned Judge of the trial Court was not justified in placing reliance on her testimony while considering the case of the prosecution against the appellants. It was also argued by the learned counsel that testimony of witness Nitaben rules out presence of child witness Dinesh at the time of incident and, therefore, testimony of witness Dinesh was also of no assistance to the prosecution. What was maintained by the learned counsel of the appellants was that Chandaben, who was injured, had, in fact, not identified her assailant nor seen assault being mounted on her husband nor witnessed assault on witness Dinesh or witness Nitaben and, therefore, the prosecution case should not have been accepted by the learned Judge. It was argued that the evidence on record has been completely misread by the learned Judge of the trial Court, and in view of glaring defects appearing in the testimony of the so-called eye witnesses, the impugned judgment should be set aside and the appellants should be acquitted after according them benefit of reasonable doubt which arises from the facts of the case.

7. Mr.K.P.Raval, learned A.P.P., contended that testimony of witness Nitaben Ambalal read with her complaint as well as that of witness Chandaben and witness Dinesh establishes that original accused No.1 had inflicted dharia blows on Chandaben, Nitaben and Dinesh; whereas original accused No.2 had assaulted the deceased with a thick-stick and, therefore, well-founded conviction of the appellants should not be interfered with by this Court in these appeals. It was argued that the learned Judge of the trial Court has recorded cogent

reasons for convicting the appellants under Section 302 r.w.sec. 34 and Section 307 & 34 r.w.sec.34 I.P.C. and, therefore, the appeal should be dismissed more particularly when the learned counsel of the appellants has failed to dislodge those reasons.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. The fact that deceased Ambalal died a homicidal death is not in dispute. Injuries which were sustained by the deceased have been enumerated in detail in inquest panchnama produced on record of the case at Exh.20. The testimony of Dr.Chandrakant B.Darji recorded at Exh.21 establishes that he had received dead body of the deceased on July 27, 1997 for post-mortem examination and that he had conducted autopsy on the dead body of the deceased. The Medical Officer has enumerated external as well as internal injuries which were noticed by him when his substantive evidence was recorded before the Court. Those injuries are also mentioned in post-mortem notes produced on the record of the case at Exh.22. It is nobody's case that the deceased had received injuries mentioned in post-mortem notes accidentally, nor there is evidence to show that those injuries were self-inflicted injuries. Having regard to the nature of evidence on record, this Court is of the opinion that the learned Judge was justified in concluding that it was proved by the prosecution beyond reasonable doubt that the deceased died a homicidal death. The said finding being eminently just is hereby upheld.

9. On reappreciation of evidence of 16 witnesses examined by the prosecution, this Court is of the opinion that ultimately the prosecution case hinges on the testimony of four witnesses,namely, (i) Nitaben Ambalal Exh.12, (ii) Chandaben Ambalal Exh.35, (iii) Ramabhai Jenabhai Exh.36, and (iv) Dinesh Exh.41 and, therefore, it would be relevant to notice salient features appearing from their evidence.

9.1 Nitaben Ambalal, PW.1 Exh.12, has stated that the incident in question had taken place on July 24, 1997 and that altercation had taken place between the deceased and the original accused No.1, as opening in the hedge was closed by the original accused No.1. According to her, original accused No.1 had gone inside his house and brought dharia and delivered two blows on head of Chandaben, who was standing near the deceased. It is maintained by the witness before the Court that on

receipt of blows, her mother Chandaben had fallen down raising a shout, as a result of which her father Ambalal, who was in the house, had come out running. What is maintained by this witness before the Court is that at that time accused No.2 had delivered blows with thick-stick on different parts of body of her father, as a result of which her father had sustained serious injuries and fallen down. It is also claimed by the witness that thereafter her younger brother Dinesh was assaulted by original accused No.1 with dharia and she herself was also injured on chest with blunt portion of dharia by accused no.1.

9.2 In her cross-examination, it is stated by the witness that Vaghabhai Kalabhai, who was owner of adjoining field and in whose field the opening made in the hedge was abutting, had demanded to close the opening. According to this witness, at the time of incident her father Ambalal was standing near the place where cattle were tethered and her mother Chandaben was cooking food in the house. What is admitted by this witness in her cross-examination is that on hearing an altercation, her mother had gone out, after which altercation and hurling of abuses had continued and that she had heard shouts of her mother, as a result of which her father Ambalal, who was inside the house, had also gone to the place of incident. It is further admitted by the witness that after sometime she had also come out of her house to ascertain as to what had happened and found that her mother and father were lying on ground near the place where cattle were being tethered. It is mentioned by this witness in her cross-examination that at that time her younger brother Dinesh had gone to the field known as 'Kuvavala' for the purpose of watching T.V. and that he had made inquiry with her as to what had happened. Her testimony would show that different versions have been given by her as to the place where her F.I.R. was recorded. In Para-4 of her testimony it is stated by her that her complaint was recorded at Nagarpalika Hospital, Mahemdavad; whereas in Para-9 of her testimony it is mentioned by her that her complaint was recorded in the field itself, wherein the incident had taken place, and in the same paragraph it is further stated by her that her complaint was recorded at Mahemdavad Police Station.

9.3 On reappreciation of evidence of this witness it becomes evident that she had gone to the place where her parents were lying after the incident was over and she had no opportunity to witness the incident. Under the circumstances, her claim that her mother was assaulted

with dharia by original accused No.1, or that her father was assaulted by original accused No.2 with thick-stick or that her brother was also assaulted by accused No.1 with dharia becomes highly doubtful. Her testimony rules out presence of witness Dinesh at the time and place of incident. From her testimony, it becomes clear that witness Dinesh was watching T.V. in a house situated in the nearby field and had come at the place of incident after it was over. The testimony of witness Dinesh cannot be relied upon in view of specific statement made by witness Nitaben that witness Dinesh had come after the incident was over and made inquiry as to what had happened.

10. This brings the Court to consider the testimony of witness Chandaben. Chandaben in her testimony recorded at Exh.35 has stated that when her husband had tried to know from original accused No.1 as to why he had closed the opening made in the hedge, accused No.1 had delivered a dharia blow on her head and that because of giddiness she had fallen down. This witness does not refer to injuries to her husband by any one or injury to Dinesh by any one or injury to witness Nitaben. The last line of her cross-examination makes it very clear that at the time of incident there was complete darkness and that she was not knowing as to who had assaulted her. Therefore, testimony of witness Chandaben is of little assistance to the prosecution. As observed earlier, witness Nitaben had no opportunity to witness the incident. There is inconsistency regarding place where the F.I.R. was written down. In her complaint, it was stated by her that original accused No.1 had inflicted injury with dharia on her back, whereas before the Court it was asserted by her that original accused No.1 had caused injury with dharia on her chest and the medical evidence on record shows that she was complaining of pain in shoulder. She has further admitted that while running she had fallen down and, therefore, sustained injury on shoulder. Thus, regarding her injury also she has given different versions. On reconsideration of her evidence, this Court finds that the same is not reliable and does not connect any of the appellants with the crime in question. Of course, witness Dinesh has stated in his testimony before the Court that first-of-all her mother was assaulted by original accused No.1, after which his father was assaulted and thereafter he himself was assaulted by accused No.1, but testimony of Nitaben makes it clear that at the time of incident he was not present at all and was watching T.V. and had come subsequently after the incident was over.

The testimony of witness Bhuriben Ramabhai also falsifies the claim of complainant Nitaben that after the incident was over, she had called Ramabhai Jenabhai and Bhuriben Ramabhai, and informed them about the incident. Bhuriben, who is examined at Exh.37, has clearly stated that though she had gone to the place of incident, she was not informed by Nitaben as to who had quarrelled with the deceased. Having regard to the totality of the facts, this Court finds that evidence tendered by prosecution against the appellants is sketchy and unsatisfactory and, therefore, the appellants are entitled to benefit of reasonable doubt which emerges from the record of the case.

For the foregoing reasons, both the appeals are allowed. Judgment dated August 18, 1998 rendered by the learned Additional Sessions Judge, Nadiad, in Sessions Case No. 291 of 1997 by which the appellants have been convicted under Section 302 read with section 34 of I.P.C. as well as Sections 307 & 324 read with section 34 I.P.C. and sentenced to suffer R.I. for life and fine of Rs. 500/-, in default, S.I. for three months for commission of offence punishable under Section 302 read with section 34 I.P.C. as well as R.I. for two years and fine of Rs. 250/-, in default, S.I. for one month for commission of offences punishable under Sections 307 & 324 r.w.sec.34 of I.P.C. is hereby set aside, and the appellants are acquitted. The respondent is directed to release the appellants forthwith, unless their presence or presence of any of them is needed with reference to any other case. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(M.C.Patel,J.)

(patel)